Supreme Court, U.S.
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No. 91-1284

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL NO. 111

Petitioner,

v.

COLORADO-UTE ELECTRIC ASSOCIATION, INC.,
and NATIONAL LABOR RELATIONS BOARD

Respondents.

SUPPLEMENT IN THE NATURE OF REPLY OF RESPONDENT COLORADO-UTE TO OPPOSITION OF THE NATIONAL LABOR RELATIONS BOARD

Gerard C. Smetana
RICHMAN,LAWRENCE,MANN
GREENE & SMETANA
333 West Wacker Drive
Chicago, Illinois, 60606
(312) 855-0300
Attorneys for Respondent

Michael E. Avakian
(Counsel of Record)
CENTER ON NATIONAL
LABOR POLICY, INC.
5211 Port Royal Rd.
Springfield, VA 22151
(703) 321-9180

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SUPPLEMENT IN THE NATURE OF REPLY OF RESPONDENT COLORADO UTE TO OPPOSITION OF THE NATIONAL LABOR RELATIONS BOARD

Respondent Colorado Ute respectfully files this Supplement in the Nature of Reply* to the Opposition of the National Labor Relations Board in Opposition, in view of the Decision of the D. C. Circuit in NLRB v. McClatchy Newspapers, Inc., No. 90-1062, decided by the DC Circuit on May 15, 1992 submitted by the Solicitor General to the Court by letter of May 18, 1992.

Respondent is compelled to file this Supplement in the

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* Consistent with Respondent's alternative position, See page 12 of Res. Brf in Op.

Nature of Reply in view of the Decision of the D. C. Circuit in McClatchy taken together with the Solicitor General's position that the Court not accept the Union's Petition as it was premature, and by virtue of the fact that the same issue was pending before the DC Circuit in McClatchy.

After reading the DC Circuit's Per Curiam Decision and three separate Opinions in McClatchy, Respondent respectfully urges the Court to accept the case for review and to affirm the Decision below, as the questions presented are of major importance and at root in every collective bargaining negotiation in the country.

The Board continues to follow its erroneous position in Colorado Ute, as evidenced by its Decision in McClatchy. This adversely affects the day to day ability of employers to make decisions in collective bargaining once impasse is reached on a mandatory subject of bargaining, i.e, whether or not it will or not be an unfair labor practice to implement the employer's final offer.

The persuasive Opinion of Judge Harry Edwards in McClatchy not only highlights the importance of the Colorado Ute decision, but also highlights why this is such an important issue that should be accepted and affirmed by the Court at this time. The Per Curiam Opinion in McClatchy, holds that the decision of the Board:

> "does not constitute reasoned decision making under past Board and court interpretations of the Act." (Slip Op., Pg. 2).

The Board in McClatchy held that:

> "McClatchy violated its duty to bargain when it unilaterally granted merit increases to some employees after reaching a good faith impasse over a discretionary merit pay proposal. In so finding, the Board, followed its decision in Colorado Ute, ..." (Slip Op., pg. 7).

Judge Edwards, while stating that the decision of the Board in McClatchy:

> "...is neither rational nor consistent with the Act." (Slip Op.,pg.8),

and that the

> "Board's so-called waiver theory is a farcical misapplication of the law," (Slip Op.,pg.9),

nevertheless accomplishes a remand and uses his decision as a road map to guide the Board in arriving at a new rationale to affirm its "unrepairable" Colorado Ute Decision.

We respectfully urge this Court, consistent with the Opinion of Judge Henderson, that:

> "after impasse, McClatchy was entitled under established law to implement its proposal and grant its merit increases. Thus in attempting to prevent an implementation, the Board

> impermissibly exerted its power to dictate the substantive terms of the collective bargaining agreement ..." (citing the 10th Circuit's decisions Colorado Ute" and this Court's decision in H. K. Porter Co., Inc., 397 U.S. 99 103-104 (1970) and other cases). (Slip Op. pgs.1-2)
>
> Judge Henderson correctly goes on to state:
>
> "Given the clear precedent supporting the lawfulness of McClatchy's conduct, I find it more than merely difficult to comprehend the Board's judgment in this case, as did Judge Edwards. (citing to Judge Edward's Opinion at 24 of the Slip Opinion), I find it impossible. For this reason, I would refuse to enforce the Board's unsupported (and insupportable) decision and, I hope, lay this issue to rest." (Slip Op., pg. 2).

We similarly ask this court to lay the issue to rest.

The Board's Colorado Ute rationale, which it follows in McClatchy is predicated on its erroneous "waiver theory". Judge Edwards correctly states with regard to the waiver theory, that the Board's position is:

> "...comparing apples and oranges. In none of the cases the Board cites did the employer attempt to bargain about the change before enacting it...(citing cases) The Board has attempted to take the words from decisions involving claims of 'waiver' in situations where an agreement exists and apply them to cases where the parties are bargaining to secure an agreement. It does not work because in the latter situation, the impasse rule comes into play (thus making 'waiver' irrelevant)." (Slip Op., pg. 29)

Judge Edwards correctly concludes at the beginning of his statement that

> "... the Board, in a wholly unconvincing opinion rested on a badly misguided theory of 'waiver', holding that the newspaper was guilty of an unfair labor practice because it had acted without securing a necessary waiver upon the Union's right to bargain with respect to each individual employee's merit increase. (Slip Op., pg.2).

Judge Edward's Opinion in McClatchy highlights why

the important statutory issues under the National Labor Relations Act have been totally misapplied by the Board in Colorado Ute and in McClatchy, and why these issues are of such overriding importance.

It is critical in the implementation of day to day national labor policy that the law of the land reflect the interpretations that the Board and the courts have made permitting an employer to implement his final offer after reaching impasse on a mandatory subject of bargaining. The Board's waiver doctrine, created out of whole cloth, in the context of this case cannot be permitted to stand even for the three years it will take for McClatchy to be decided on review again pursuant to the remand of the D. C. Circuit. We disagree with the Solicitor General's Submission that the issue is not ripe, and by implication, consistent with the D. C. Circuit's Per Curiam holding, the Board should be given another chance.

In Colorado Ute itself, Colorado Ute and the undersigned on behalf of the Council On Labor Law Equality, participated in a rare oral argument before the Board en banc for an entire day. Counsel for the AFL-CIO participated in the oral argument as well. This issue has been fully considered by the Board as few issues have been considered. The Board clearly determined in Colorado Ute to change course. Presently, only the 10th Circuit has had the opportunity to correct the Board's error, but employer's throughout the land are governed and continue to be governed by the Board's Colorado Ute decision, which it continues to follow. We urge this Court to accept Certiorari, and affirm the decision of the 10th Circuit.

Respectfully submitted,

Gerard C. Smetana, P.C.
RICHMAN, LAWRENCE, MANN, GREENE & SMETANA
A Law Partnership of
Professional Corporations
333 WestWacker Drive-Suite 2860
Chicago, Illinois 60050
(312) 855-0300

Michael E. Avakian
(Counsel of Record)
CENTER ON NATIONAL LABOR POLICY, INC.
5211 Port Royal Road Suite 103
North Springfield, VA 22151
(703) 321-9180

Attorneys for Respondent

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